

RECEIVED

JUN 22 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Price Cap Regulation of Local)
Exchange Carriers)

CC Docket No. 93-179

Rate-of-Return Sharing and Lower)
Formula Adjustment)

DOCKET FILE COPY ORIGINAL

GTE's OPPOSITION TO MCI's PETITION

GTE Service Corporation and its affiliated domestic telephone operating companies ("GTE"), opposing MCI's Petition for Reconsideration dated May 24, 1995 (the "*Petition*") addressed to the *Add-Back Order*¹ in the captioned proceeding, urge the Commission to deny the *Petition*.

DISCUSSION

GTE joins Pacific Bell in opposing the *Petition*, which asks the Commission to take unlawful retroactive action.

GTE supports the Opposition of Pacific Bell filed June 9 and adds the following.

It is explicitly stated by the *Add-Back Order* (at para. 56) that the action here being taken is **prospective only**: "Because the add-back requirement does not

¹ Price Cap Regulation of Local Exchange Carriers: Rate of Return Sharing and Lower Formula Adjustment, CC Docket No. 93-179, Report and Order, FCC 95-133 (released April 14, 1995) (the "*Add-Back Order*"), *appeal pending sub nom.* Ameritech Operating Companies v. FCC, No. 95-1239 (D.C. Cir., filed April 28, 1995).

currently appear in our rules, we adopt the proposed revisions...."² Not satisfied with this, MCI (at 1) argues the Commission should go beyond prospective action. Despite the *Bowen*³ rule, MCI would have the Commission do what the *Add-Back Order* itself recognizes as unlawful: make a decision of retroactive effect amounting to retroactive ratemaking.

Thus, the *Add-Back Order* (at para. 49), citing *Bowen*, "agree[s] with commenters that "the explicit add-back rule adopted here may, as a legal matter, be applied only on a prospective basis."⁴ In reaching this conclusion, the *Add-Back Order* is correct.⁵

MCI's argument (at 3) that add-back is "not a new rule [but] merely a codification of long-standing, and prior to the advent of price cap regulation, unopposed Commission practice" conflicts with the agency's own reading of its decisional history. In any case, even if it were "an unopposed practice," this would not make it a rule.⁶

² See also the *Add-Back Order* (at para. 3) adopting the rule "**prospectively** for companies subject to price cap regulation." *Emphasis added*. GTE is one of a number of companies challenging on appeal the legality of the *Add-Back Order* on grounds of retroactivity.

³ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) ("*Bowen*"). "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.*, 488 US at 208, *citations omitted*. "Even where some substantial justification for retroactive rulemaking is present, courts should be reluctant to find such authority absent an express statutory grant." *Id.*, 488 US at 208-209.

⁴ *Footnote omitted*.

⁵ See *Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 173 (D.C. Cir. 1994): "[T]he Commission is free to consider [various bases for rejecting exogenous cost treatment] as a basis for *amending* its current rule, not for concocting a new rule in the guise of applying the old."

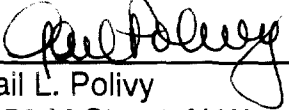
⁶ See *United States Tel. Ass'n v. FCC*, 28 F.3d 1232-36 (D.C. Cir. 1994).

Accordingly: The Commission should deny the *Petition*, which urges the FCC to take rate action that would clearly constitute unlawful retroactive ratemaking.

Respectfully submitted,

GTE Service Corporation and its affiliated
domestic telephone operating companies

Richard McKenna, HQE03J36
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(214) 718-6362

By 
Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5214

June 22, 1995

Their Attorneys

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "GTE's Opposition to MCI's Petition" have been mailed by first class United States mail, postage prepaid, on the 22nd day of June, 1995 to all parties on the attached list.

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz", written in a cursive style.

Ann D. Berkowitz

John W. Bogy
Attorney
Pacific Bell and Nevada Bell
140 New Montgomery Street
Room 1530-A
San Francisco, CA 94105

Joseph Di Bella
Attorney
NYNEX Telephone Companies
1300 I Street, NW
Suite 400 West
Washington, DC 20005

Chris Frentrup
Senior Regulatory Analyst
MCI Telecommunications Corporation
Federal Regulatory Affairs
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Margaret E. Garber
Pacific Bell
1275 Pennsylvania Avenue
Washington, DC 20004

James T. Hannon
Attorney
US West Communications
1020 19th Street, N.W.
Suite 700
Washington, DC 20036

Peter H. Jacoby
Attorney
American Telephone and
Telegraph Company
295 North Maple Avenue Rm 3244J1
Basking Ridge, NJ 07920

Rochelle D. Jones
Director-Regulatory
Southern New England Telephone Company
227 Church Street
Fourth Floor
New Haven, CT 06510-1806

Mary McDermott
General Counsel
United States Telephone Association
1401 H Street, NW
Suite 600
Washington, DC 20005

Michael S. Pabian
Attorney
Ameritech Operating Companies
2000 West Ameritech Center Drive
Room 4H76
Hoffman Estates, IL 60196-1025

Thomas A. Pajda
Attorney
Southwestern Bell Telephone Company
1010 Pine Street
Room 2114
St. Louis, MO 63101

Edward Shakin
Attorney
Bell Atlantic Telephone Company
1320 North Courthouse Road
Eighth Floor
Arlington, VA 22201

Michael J. Shortley, III
Attorney
Rochester Telephone Corporation
180 South Clinton Avenue
Rochester, NY 14646

Lawrence R. Siman
Attorney
Verner, Liipfert, Bernhard, McPherson & H
901 15th Street, NW
Suite 700
Washington, DC 20005-2301

M. Robert Sutherland
Attorney
BellSouth Telecommunications, Inc.
4300 Southern Bell Center
675 West Peachtree Street, NE
Atlanta, GA 30375

James L. Wurtz
Attorney
Pacific Telesis
1275 Pennsylvania Avenue, NW
Washington, DC 20004